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No. 302

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In the Supreme Court of the United States

OCTOBER TERM, 1961

HYLAND ET AL., PETITIONERS

v.

WATSON ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The order of the United States District Court for the Southern District of Ohio (R. 48a) is unreported. The *per curiam* order of the Court of Appeals (Pet. App. 1a) is reported at 287 F. 2d 884. The order of the Court of Appeals denying rehearing (Pet. App. 1a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 10, 1961. A timely petition for rehearing was denied on April 13, 1961. The time for filing a

petition for a writ of certiorari was extended by a Justice of this Court to August 10, 1961, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether a contention that the Veterans Preference Act is unconstitutional, because it allegedly violates the Fifth Amendment, the doctrine of separation of powers and the prohibition against *ex post facto* laws presents a substantial question warranting the convening of a three-judge court.

STATUTE INVOLVED

Section 12 of the Veterans Preference Act of June 27, 1944, c. 287, 58 Stat. 390, 5 U.S.C. 861, provides:

> In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further,* That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings * * *.

STATEMENT

This action by six non-veteran employees of the Department of the Air Force at Wright-Patterson Air Force Base, Ohio, and an association of federal employees, was brought against respondents [1] to enjoin the operation of the Veterans Preference Act, 5 U.S.C. 861, on the ground of its unconstitutionality (R. 2a-13a). Application was made by the petitioners for the convening of a three-judge court, pursuant to 28 U.S.C. 2282, 2284 (R. 13a-14a).

The complaint alleged that four of the individual petitioners, Hyland, Schmidt, Ross, and Tomasko had more than fifteen years seniority as civil service career employees at the Base when, in October, 1957, they received "Reduction-in-Force" notices separating them from their employment (R. 4a-7a). The two remaining individual petitioners, McConnell and O'Brien, with more than sixteen years seniority on the job, received "Reduction-in-Force" notices during 1957, reducing them in grade and in pay (R. 6a-8a). It is further alleged that all of the petitioners have had efficiency rating of "satisfactory" or better, and that, except for the operation of the Veterans Preference Act, they would not have been separated or reduced in grade (R. 4a-8a).[2]

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[1] Respondents Rawlings and Wray are generals in command at the base; respondents Watson and Rose are civilian personnel officers at the base (R. 3a-4a).

[2] The petitioner Federal Employees Equality Association joined in the complaint, also asserting the unconstitutionality of the Veterans Preference Act, although it does not specifically appear that any of its members, other than the six named petitioners, have been affected by the statute (R. 11a-12a).

The complaint also asserts that, in accordance with the regulations of the United States Civil Service Commission,[3] adopted pursuant to the Veterans Preference Act, the respondents have directed that non-veteran career employees, classified as Group I B under the regulations, be subordinated to veteran career employees, classified as Group I A, in reductions in force at the installation where they were employed (R. 9a). Such priority to former members of the armed services is accorded only to those with performance ratings of "good" or better. This preference, the complaint states, amounts to a deprivation of the right to employment without due process of law, is an arbitrary discrimination against non-veterans, and is *ex post facto*. Petitioners also argue that the Veterans Preference Act is void because it lacks reasonable standards for determining categories and that it violates the doctrine of separation of powers.

Following petitioners' application for the convening of a three judge district court, respondents moved to dismiss on the ground that the complaint failed to raise a substantial constitutional question and to state a claim upon which relief could be granted (R. 15a). The District Court agreed and granted the motion. The Court of Appeals affirmed. (Pet. App. 1a.)

ARGUMENT

Unless a complaint presents a substantial question concerning the constitutionality of a statute, there is, of course, no occasion for convening a three-judge dis-

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[3] Part 20, entitled "Retention Preference Regulations," 5 C.F.R., Cumulative Pocket Supplement for use during 1957.

trict court. When a complaint is filed purportedly attacking a statute on constitutional grounds and seeking to restrain its enforcement, the single district judge must first inquire into the merits. Then, only if the court finds the constitutional issues substantial, may a three-judge court be convened. *Ex parte Poresky*, 290 U.S. 30; *Water Service Co.* v. *Redding*, 304 U.S. 252. In the instant case, the courts below were plainly correct in holding that the constitutional issues are insubstantial.

1. Preference for veterans in federal employment has an extensive history, dating back to the administration of President Lincoln. See the Act of March 3, 1865, 13 Stat. 571, which granted employment preference to disabled veterans. Later, in 1876, other veterans, their widows, and orphans were included, 19 Stat. 143, 169. Again, in the Act creating the modern civil service system, Congress reaffirmed the policy of awarding employment preference to veterans, Civil Service Act of 1883, § 7, 22 Stat. 403, 406. In 1912, the preference accorded former servicemen was extended, Act of August 23, 1912, § 4, 37 Stat. 360, 413. The Veterans Preference Act of 1944 is but the latest expression of the long and well established Congressional policy of granting preference in federal employment to those who served in the nation's armed forces.

This traditional policy of preferring veterans of equal or better efficiency has been repeatedly upheld by the courts. In *Gianatasio* v. *Kaplan et al.*, 257 N. Y. 531, 178 N.E. 782, the New York Court of Appeals sustained that state's veterans preference law against

the argument that it violated the equal protection clause of the Fourteenth Amendment. An appeal to this Court was taken, but was "dismissed for the want of a substantial federal question." See *Gianatasio* v. *Kaplan et al.*, 284 U.S. 595. That decision clearly controls the instant case.

Again, in *Hilton* v. *Sullivan*, 334 U.S. 323, this Court upheld the policy of granting priority to veterans. That case, like the instant one, involved the Veterans Preference Act of 1944. Although the attack was directed at the Civil Service Commission's authority under the statute to disregard length of service in granting veterans a preference over non-veterans, and not expressly directed to constitutional issues, the arguments made there were similar to those of the petitioners in the present case. The charge was that "[t]he failure of the Commission to consider relative length of service in establishing these retention priorities was * * * 'unreasonable, arbitrary, and capricious, without statutory warrant, and contrary to the express provisions' of applicable statutes." *Id.* at 327. This Court, however, upheld the validity of the regulations, pointing out that the merits of the policy was a question for the legislature: "Thus Congress passed the bill with full knowledge that the long standing absolute retention preferences of veterans would be embodied in the Act. Petitioner makes an appealing argument against this policy. But it is a policy adopted by Congress, and our responsibility is to interpret the Act, not to overrule the congressional policy." *Id.* at 339. Basically, the argument in the

present petition amounts to an attack on that policy. But as noted by this Court in *Hilton*, the wisdom of the policy is a matter for Congress.

White v. *Gates*, 253 F. 2d 868 (C.A. D.C.), certiorari denied, 356 U.S. 973, similarly sustained the granting of a priority to former members of the armed forces. There, as here, the Veterans Preference Act was attacked on constitutional grounds. The District of Columbia Circuit, like the court below, held that there was no substantial issue requiring a three-judge district court, stating (p. 869): "Veterans' preference in federal employment has been an established policy of Congress for many years. Encouragement and reward of military service are its rational basis. If it is unwise and costly, this does not make it unconstitutional. The Supreme Court and other courts have enforced it, and have done so without suggesting any possible constitutional difficulty." This Court denied review.

"The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject." *Water Service Co.* v. *Redding*, 304 U.S. 252, 255. The decisions to which we have alluded above make clear that the contentions advanced in this case were laid to rest long ago.

2. Although it seems unnecessary to go beyond the citation of authority, we point out briefly why we believe that petitioner's constitutional arguments are plainly without substance.

The contention that the Act violates the petitioners' "right to work" misconceives the nature of their rights. While Congress cannot adopt arbitrary and discriminatory standards for public employment, such as religious or racial criteria, there is otherwise no judicially enforceable right to federal employment. *United States* v. *Perkins,* 116 U.S. 483; *Crenshaw* v. *United States,* 134 U.S. 99; *Eberlein* v. *United States,* 257 U.S. 82. Certainly, Congress can establish standards for the selection and retention of employees as long as those standards have a reasonable basis.

Turning to the instant case, it is clear that giving veterans with satisfactory performance ratings a priority in federal employment cannot be attacked as an arbitrary discrimination. Whatever may be the wisdom of this policy, it has a rational basis. It rests on Congress' conclusion that able men who served the nation as members of the armed forces should be given special recognition for the public service they have performed. Whatever the pros and cons as to the social and economic desirability of the classifications, they are clearly not so unreasonable as to constitute a deprivation of due process. Nor is there any vagueness in the standards for determining who is eligible for preference. Those who have been members of the armed services are given priority over those who have not. There is no difficulty in determining who falls within the preferred categories.

Nor is there any merit to the argument that the Veterans Preference Act conflicts with the doctrine of separation of powers by infringing upon the Presi-

dent's right to control the appointment and removal of executive personnel. The Constitution (Article II, § 2, Cl. 2) expressly grants Congress the power to control the appointment of subordinate employees. This "implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed." *United States* v. *Perkins*, 116 U.S. 483, 485. See, also, *Myers* v. *United States*, 272 U.S. 52, 161.

Finally, petitioners' "*ex post facto*" challenge to the statute is entirely without substance. The Veterans Preference Act imposes no penalty or punishment upon the petitioners within the meaning of the *ex post facto* clause, Article I, § 9, Cl. 3. See *Calder* v. *Bull*, 3 Dall. 386. The purpose of the Act, moreover, is only to benefit former members of the military. If the incidental effect is to lessen the petitioners' job security, the short answer is that they never had a constitutionally protected right to federal employment. The logical result of petitioners' argument would be that the Government could never change seniority criteria, employment standards, etc., for such action would always affect personnel already employed by the Government.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition should be denied.

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